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No.

Supreme Court, U.S.  
FILED

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JOSEPH F. SPANIOL, JR.  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

GREGORY HILKE,  
*Cross-Petitioner,*

vs.

ERIC A. GRIFFIN,  
*Cross-Respondent.*

**CROSS-PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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22/20



## **QUESTIONS PRESENTED**

Was it clearly established on February 18, 1978 that a police officer's use of deadly force to apprehend a nondangerous fleeing felon was unconstitutional so as to deprive the officer of the defense of qualified immunity in an action brought against him pursuant to 42 U.S.C. §1983?

## **PARTIES BELOW**

The parties to the proceeding below were the cross-petitioner Gregory Hilke, Hilke's co-defendant and co-appellant Francis Stoll, and cross-respondent Eric A. Griffin. Cross-petitioner Hilke has filed this petition solely for the purpose of preserving an issue that would provide him with more than the judgment below (see Argument below, p. 4). Stoll would also be affected by the determination of this issue, but he will raise it in defense of the judgment entered below on his behalf, should cross-respondent Griffin's petition for writ of certiorari be granted. Therefore, Stoll does not join in this cross-petition.



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GREGORY HILKE,  
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*Cross-Respondent.*

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**CROSS-PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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Cross-Petitioner Gregory Hilke respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled proceedings on November 6, 1986. Cross-petitioner requests that his cross-petition be considered only if the Court is disposed to grant the petition in *Griffin v. Hilke*, filed March 20, 1987, and assigned docket number 86-1526.

**OPINIONS BELOW**

The opinion of the Court of Appeals for the Eighth Circuit is reported at 804 F.2d 1052 and is reprinted as Appendix A to the initial petition for writ of certiorari, styled *Griffin v. Hilke*, Docket No. 86-1526, p. 17a.

The memorandum decision of the United States District Court for the Eastern District of Missouri (Cahill, D.J.) has not been reported. It is reprinted in the Appendix to the petition for writ of certiorari in *Griffin v. Hilke*, Docket No. 86-1526, pp. 12a-17a.

### JURISDICTION

Cross-respondent's lawsuit was filed in Missouri circuit court on several state law theories and on the basis of 42 U.S.C. §1983. The latter claim was one over which the United States District Court would have had original jurisdiction pursuant to 28 U.S.C. §1331, and the cause was removed to that court pursuant to 28 U.S.C. §1441. On November 14, 1984, the district court entered judgment in favor of cross-respondent and against cross-petitioner, and the district court denied cross-petitioner's post-trial motion on January 3, 1986.

The United States Court of Appeals for the Eighth Circuit reversed the judgment of the district court in a judgment filed November 6, 1986, and remanded the case for a new trial against cross-petitioner.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

This cross-petition is filed in reliance upon Supreme Court Rule 19.5. The date of receipt of the petition for certiorari in connection with which this cross-petition is filed was March 23, 1987.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in cross-respondent's petition for certiorari in *Griffin v. Hilke*, Docket No. 86-1526, and in cross-petitioner's brief in opposition to cross-respondent's petition for certiorari in *Griffin v. Hilke*, Docket No. 86-1526.



## STATEMENT OF THE CASE

The facts pertaining to the underlying events of this case are set forth in the opinion of the court of appeals which cross-petitioner adopted as the statement of the case in his brief in opposition to cross-respondent's petition for certiorari in *Griffin v. Hilke*, Docket No. 86-1526. The facts pertinent to this cross petition may be stated succinctly. Cross-respondent's pleading was based upon cross-petitioner's use of deadly force in arresting cross-respondent, in circumstances where cross-petitioner should have known that cross-respondent was not dangerous, Appendix, pp. A- 4-5. The complaint shows on its face that the arrest took place on February 19, 1978 *Id.*, p. A-5. Cross-petitioner pled good faith immunity as an affirmative defense, *Id.* pp. A- 8-9.

The verdict director requested by cross-respondent and given by the district court relied upon the same theory. *Id.*, p. A-11. The district court ruled adversely to cross-petitioner on the qualified immunity defense believing that it was incumbent upon cross-petitioner to have pled facts, to have adduced evidence, and to have requested an instruction on the issue. *Griffin v. Hilke*, Appendix, p. 16a. On appeal, the Eighth Circuit reversed the judgment against cross-petitioner on the ground of improper closing argument by cross-respondent's counsel, and remanded for new trial, *Id.*, p. 10a. Because of that disposition, the qualified immunity issue was not reached. *Id.*

## REASON FOR GRANTING THE WRIT

**The Failure To Enter Judgment On Behalf Of Cross-Petitioner On The Ground Of His Qualified Immunity Is In Conflict With This Court's Opinion In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).**

This cross-petition is filed solely for the purpose of assuring that cross-petitioner will be able to defend the judgment of the court of appeals vacating the judgment of the district court against him and remanding the case for new trial on a ground that would afford cross-petitioner more than the judgment the court of appeals afforded him. See *Strunk v. United States*, 412 U.S. 434 (1973). But see *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) this Court held that "government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* 457 U.S. at 818. In *Malley v. Briggs*, 475 U.S. \_\_\_, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) the Court held that these principles are applicable to police officers. In 1985, the Court held for the first time that it is unconstitutional to use deadly force upon nondangerous fleeing felons. See *Tennessee v. Garner*, 471 U.S. \_\_\_, 1055 S.Ct. 1694, 85 L.Ed.2d 1 (1985). Since the act upon which cross-petitioner's liability is predicated is the use of deadly force to prevent the escape of a non-dangerous fleeing felon in 1978, it is a matter of elementary logic that cross-petitioner is immune, and the failure of the lower courts to enter judgment in his favor is in conflict with this Court's decisions.

The issue is discussed at greater length at pages 7 through 13 of cross-petitioner's brief in opposition to cross-respondent's petition for certiorari in *Griffin v. Hilke*, Docket No. 86-1526.

### CONCLUSION

For the foregoing reasons certiorari should issue to the Court of Appeals for the Eighth Circuit so that this Honorable Court may review and correct the decision below, if the Court should grant certiorari in *Griffin v. Hilke*, Docket No. 86-1526.

Respectfully submitted,

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## APPENDIX



APPENDIX

## **APPENDIX A**

### **IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS STATE OF MISSOURI DIVISION NO. 1**

**Cause No. 782-4760**

**Eric A. Griffin,  
Plaintiff,**

**vs.**

**The City of St. Louis,  
Honorable Mayor Vincent Schoemehl, Jr.  
and  
Gregory Hilke,  
and  
Officer Francis Stoll,  
Defendants.**

### **THIRD AMENDED PETITION**

#### **Count I**

For his cause of action against the Defendant, The City of St. Louis, Plaintiff states:

1. At all times hereinafter alleged, Plaintiff has been a citizen of the United States of America.
2. At all times mentioned hereinafter, Defendant City of St. Louis has been a municipal corporation and a constitutional charter city which is organized and exists by virtue of law and is subject to suit. This is an action brought under Title 42, U.S.C. §1983, for deprivation of Plaintiff Eric Griffin's civil rights. The City of St. Louis is and was at all times a person within the meaning of that statute.

3. Before, on, or about February 18, 1978, The City of St. Louis established and instituted, under color of statute, ordinance, regulation, custom, or usage, a practice whereby police officers of the City of St. Louis were allowed to have and use magnum bullets in their side-arms, and said police officers were allowed to use said weapons in the apprehension of persons suspected of having committed crimes, and under color of statute ordinance, regulation, custom and usage, The City of St. Louis failed to train, instruct and regulate its police force on the proper circumstances to use the deadly force of side-arm with magnum to apprehend suspects, and The City of St. Louis, pursuant to statute, ordinance, regulation, custom and usage, suffered and permitted said officers to use deadly force to apprehend suspects in the absence of probable cause to believe that the suspect was dangerous and posed a threat of serious harm and danger to the public, and thus and thereby the City established and instituted policies for its police force to use excessive force in the arrest of suspects.

4. Furthermore, particularly with respect to officers Hilke and Stoll, the City of St. Louis established, allowed or indulged, pursuant to statute, ordinance, custom or usage, a practice whereby said officers could and did use excessive force to arrest citizens, particularly plaintiff, by shooting said citizens with magnum bullets when such deadly force was unnecessarily excessive in violation of citizens' civil rights, and particularly the rights of plaintiff.

5. At all times hereinafter alleged, Defendant Gregory Hilke was acting as a police officer of the City of St. Louis, particularly pursuant to Section 84.330 R.S. Mo., and he was acting under color of state or local statute, ordinance, regulation, custom, or usage and practice of the State of Missouri, and the City of St. Louis and he was acting during the course and within the scope of his employment as a police officer.



6. At all times hereinafter alleged, Defendant Francis Stoll was a police officer of the City of St. Louis, particularly under Section 84.330 R.S. Mo., and he was at all times acting under color of statute, ordinance, regulation, custom or usage and practice of the City of St. Louis, State of Missouri, and at all times he was working during the course of and within the scope of his employment as said police officer.

7. On or about February 18, 1978, Defendant Stoll and Hilke undertook to arrest Plaintiff, and either one or the other of them used deadly force to arrest Plaintiff, and did shoot him with a magnum bullet. This shooting was a direct result of the policy of the City of St. Louis to permit and allow such weapons to be carried and used without adequate training and instruction.

The use of the aforesaid force to arrest the Plaintiff was unreasonable and excessive, and constituted an unreasonable arrest, search and seizure, and deprivation of life without due process of law, all violating his rights as a citizen of the United States of America, as guaranteed to Plaintiff by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; and thus and thereby the City of St. Louis subjected him or caused Plaintiff to be subjected, to the deprivation of his rights, privileges and immunities secured to him by the Constitution and laws.

8. As a direct result of the deprivation of said rights, Plaintiff suffered and sustained the following personal injuries: Plaintiff's left leg was shattered, destroyed, and amputated; he suffered a nervous shock and his nervous system has been impaired and weakened, and he suffers phantom limb pain; he suffers from loss of sleep, nervousness and irritability; he has lost earnings and wages in the sum of about Fifty Thousand Dollars (\$50,000.00) to date and will in the future lose earnings and wages; his ability to work, labor, earn wages and enjoy life has been and will be impaired and limited; he suffers from

depression, anxiety, psychiatric disorders; he has become obligated for medical attention in the sum of about Thirty-Five Thousand Dollars (\$35,000.00) to date, and in the future he will become obligated for additional medical attention and costs. He has undergone and will undergo additional hospital, medical, surgical nursing and psychiatric care and procedures: Each of the aforesaid injuries is permanent and the function and use of all said parts has been impaired and in the future will be further impaired, limited and painful, all to Plaintiff's injury and damage.

WHEREFORE, Plaintiff prays judgment against the Defendant City of St. Louis in the sum of Two Million, Five Hundred Thousand Dollars (\$2,500,000.00), plus costs and attorney's fees.

### Count II

For his cause of action against the Defendant Hilke, Plaintiff states:

1. All of Count I is incorporated by reference, adopted and realleged.

2. On or about February 18, 1978, Defendant Hilke was acting under color of statute, ordinance, regulation, custom or usage and practice of the State of Missouri and City of St. Louis, as he subjected, or caused to be subjected, Plaintiff to a deprivation of Plaintiff's rights, privileges and immunities, under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution, when Defendant Hilke arrested Plaintiff by shooting him, which was a use of deadly force which was unreasonable and excessive under the circumstances.

3. Alternatively, Defendant Hilke was negligent in using a side-arm loaded with magnum bullets to shoot Plaintiff and attempt to arrest him, in that under the facts and circumstances, Officer Hilke knew or should have known that Plaintiff was

unarmed, not dangerous, and not fleeing from any serious offense or crime.

4. As a direct result of these violations of rights by Officer Hilke, or in an alternative as a direct result of the negligence of Officer Hilke, Plaintiff suffered and sustained all those injuries set forth in Count I, *supra*.

WHEREFORE, Plaintiff prays damages against Defendant Hilke jointly and severally, with the City of St. Louis and Officer Stoll in the sum of Two Million Five Hundred Thousand Dollars (\$2,500,000.00) together with his costs and attorney's fees, under Title 42, U.S.C. §1988.

### **Count III**

For his cause of action against Defendant Stoll, Plaintiff states:

1. All of Counts I and II are incorporated by reference, adopted and realleged.

2. On or about February 18, 1978, Officer Stoll was acting under color of statute, ordinance, regulation, custom or usage and practice of the State of Missouri, City of St. Louis, when he subjected or caused Plaintiff to be subjected to a deprivation of Plaintiff's rights, privileges and immunities secured by the Constitution and laws of the United States, particularly those rights protected under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, in that Officer Stoll attempted to arrest Plaintiff by means of using deadly force of a side-arm against Plaintiff, and Officer Stoll fired his weapon at or near Plaintiff in violation of police department rules and regulations, and broadcast to fellow officers, particularly Officer Hilke, that Plaintiff was a dangerous fleeing felon, or an armed robber or robbery suspect, and that was not true, and he broadcast that his fellow officers should use deadly force to arrest Plaintiff.

3. As a direct result of these actions by Defendant Stoll, and particularly the combination of Officer Stoll's discharge of a weapon in violation of police rules in conjunction with his broadcast that Plaintiff was a dangerous and fleeing felon, Officer Stoll caused Officer Hilke to believe it would be suitable to use such deadly force of a side-arm to arrest Plaintiff; thus and thereby Officer Stoll's actions caused Plaintiff to be subjected to deadly force as used upon him by Officer Hilke, and thus and thereby Officer Stoll directly caused or contributed to cause all of the aforesaid violations of Plaintiff's civil rights and injuries as alleged in Count I.

WHEREFORE, Plaintiff prays judgment and damages against Defendant Stoll, jointly and severally, with the City of St. Louis and Officer Hilke, in the sum of Two Million, Five Hundred Thousand Dollars (\$2,500,000.00), together with his costs and attorney's fees, under Title 42, U.S.C. §1988.

#### Count IV

For his alternative cause of action against Defendant Stoll, Plaintiff states:

1. All of Counts I, II and III are incorporated by reference, adopted and realleged.

2. Defendant Stoll negligently described Plaintiff as a felon, and a fleeing felon without first ascertaining true circumstances surrounding the reasons for Plaintiff leaving the area where he was first encountered by Defendant Stoll; and

2. Defendant Stoll negligently and without probable cause by radio and other communications, advised other persons, particularly as a result of such communications, Co-Defendant Hilke, that Plaintiff was a fleeing felon, when in fact he had neither committed nor attempted to commit such a crime.

3. Alternatively, Defendant Stoll deliberately and intentionally communicated Plaintiff was a fleeing felon when

Defendant Stoll knew such communication was false, and Defendant Stoll deliberately and intentionally communicated and broadcast that it was necessary to use deadly force to arrest Plaintiff when Defendant Stoll knew such message was false. As a direct result of either the negligence or intentional act of Defendant Stoll as aforesaid, Defendant Stoll initiated and instituted the battery and shooting against Plaintiff by Officer Hilke.

WHEREFORE, Plaintiff prays judgment against the Defendant Stoll in the sum of Two Million Five Hundred Thousand Dollars (\$2,500,000.00).

HULLVERSON, HULLVERSON & FRANK, INC.

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**APPENDIX B**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

**No. 83-0247-C-5**

**Eric Griffin,  
Plaintiff,**

**vs.**

**City of St. Louis, et al.,  
Defendants.**

**DEFENDANT HILKE'S AFFIRMATIVE DEFENSES**

Comes now defendant Hilke and refiles his affirmative defenses previously filed on July 28, 1978 in the case that was removed from the Circuit Court of the City of St. Louis to this Court as follows:

**First Affirmative Defense**

Comes now defendant Hilke and for his first affirmative defense states at the time and place mentioned in the complaint the plaintiff had committed a felony and attempted to escape from defendant, an officer of the Metropolitan Police Department and therefore consented to the alleged battery.

**Second Affirmative Defense**

Comes now defendant Hilke and for his second affirmative defense states:

1. That at the time and place mentioned in the petition plaintiff had committed a felony.
2. That defendant, an officer of the Metropolitan Police

Department under Section 544.140, R.S.Mo. 1969, was required under penalty of law to pursue and arrest plaintiff.

3. That defendant, under Section 544.190, R.S.Mo. 1969, did give notice of his intention to arrest plaintiff and that plaintiff took flight and defendant used all necessary means to effect the arrest and using only that degree of force which was necessary to prevent the plaintiff from escaping.

### **Third Affirmative Defense**

Comes now defendant Hilke and for his third affirmative defense states at the time and place mentioned in the complaint defendant, an officer of the Metropolitan Police Department, had probable cause to arrest the plaintiff for a felony and used only that amount of force as was reasonable and necessary to prevent plaintiff from fleeing and escaping and that defendant acted in good faith in reliance upon the law of the State of Missouri regarding fleeing felons.

### **Fourth Affirmative Defense**

Comes now defendant Hilke and for his fourth affirmative defense states that at the time and place mentioned in the complaint defendant reasonably believed that plaintiff had committed a felony using or threatening the use of deadly force and that plaintiff was armed when he was fleeing from this defendant and defendant further reasonably believed that plaintiff would have escaped without the use of deadly force and that his defendant acted in good faith on the law of the State of Missouri and police regulations.

/s/ John J. Fitzgibbon  
Associate City Counselor  
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Copy of the foregoing hand delivered  
this 23rd day of October, 1984, to:  
James Hullverson, Jr.  
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**APPENDIX C**

**INSTRUCTION NO. 15**

Instruction Number 15; Your verdict must be for the plaintiff on his Section 1983 claim against defendant Hilke if you believe first, defendant Hilke used unreasonable force to seize and arrest plaintiff; and second, that such arrest was a proximate cause of injury and consequent damage to the plaintiff. In deciding whether unreasonable force was used, you're instructed that the use of deadly force such as shooting by a police officer is justified only when the officer reasonably believes either the crime for which the arrest is made involved conduct including the use or threatened use of deadly force and there is no other reasonable means to arrest the person, or there is substantial risk that the person to be arrested will cause the death or serious bodily if his apprehension is delayed and there is no other reasonable means to arrest the person.

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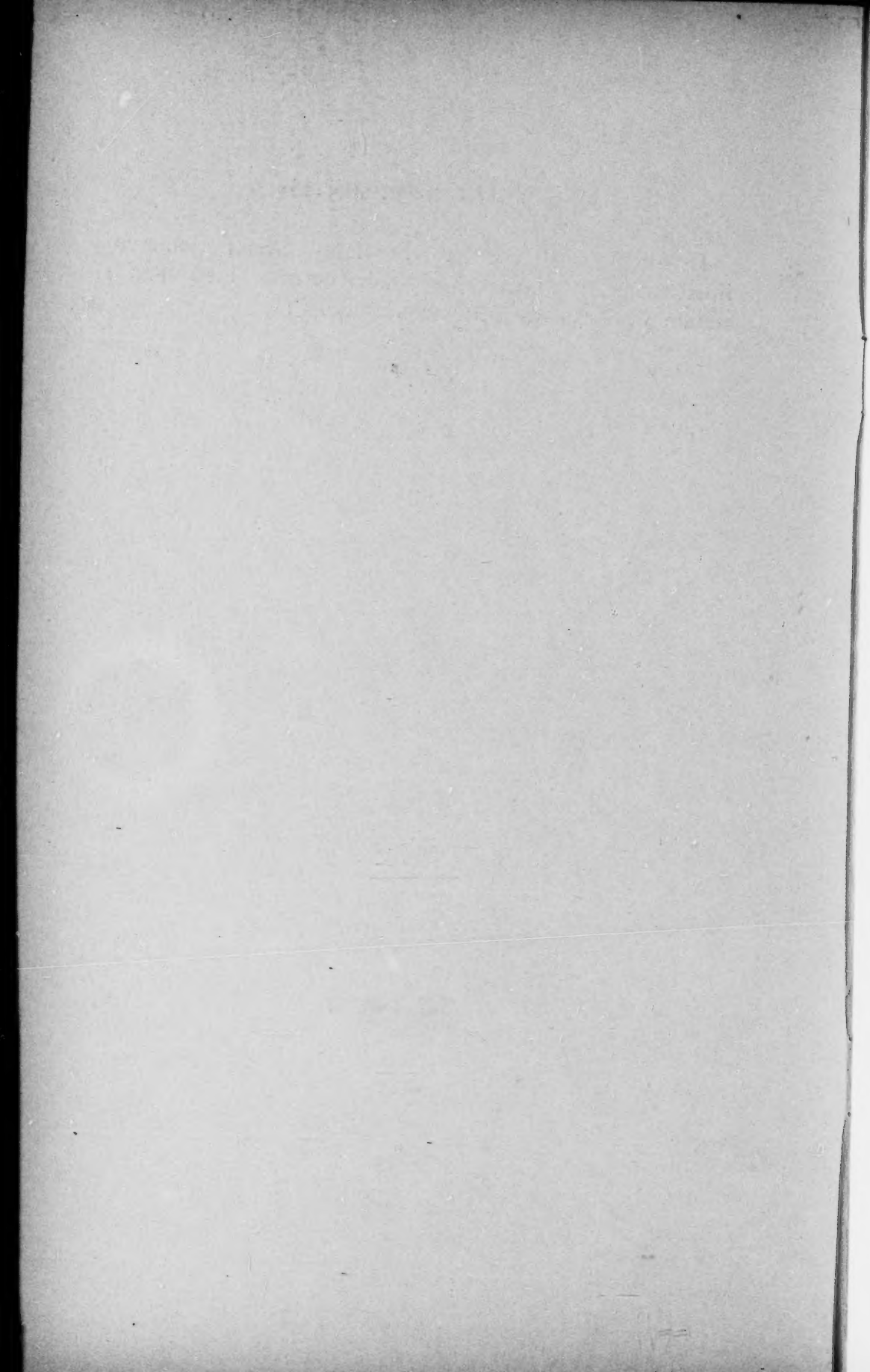
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On Cross-Petition For A Writ Of Certiorari To The  
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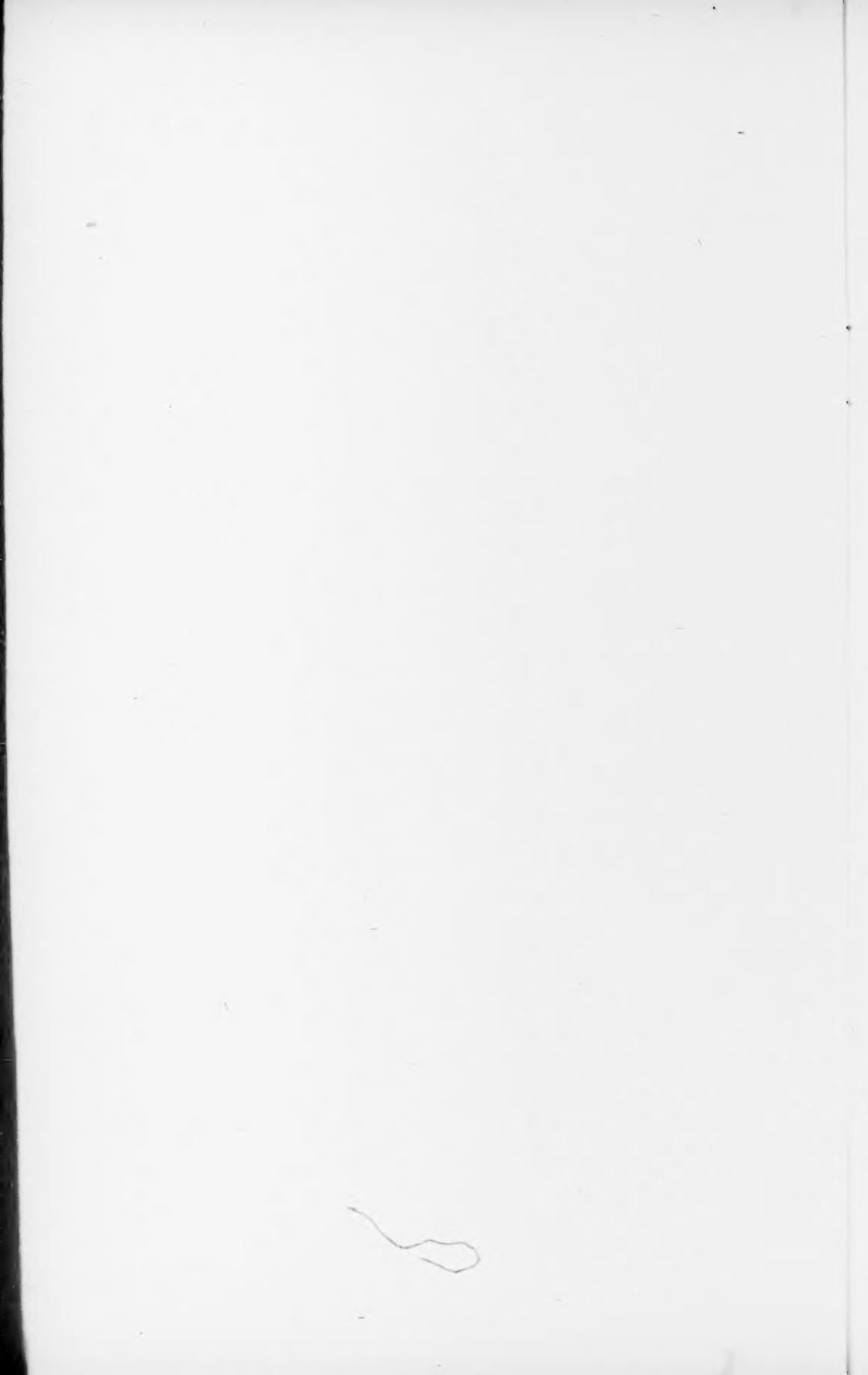
**CROSS-RESPONDENTS' BRIEF IN OPPOSITION**

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## **QUESTIONS PRESENTED**

1. Whether a police officer who shoots a fleeing felon is entitled to assert a qualified immunity defense based upon a statute previously declared unconstitutional?



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On Cross-Petition For A Writ Of Certiorari To The  
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**CROSS-RESPONDENTS' BRIEF IN OPPOSITION**

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The cross-respondent, Eric A. Griffin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on November 6, 1986, and denial of rehearing on January 22, 1987.

**OPINIONS BELOW**

The opinion of the Court of Appeals for the Eighth Circuit is reported at 804 F.2d 1052, and is reprinted in the Appendix of Griffin's Petition, p. A-1a.



The memorandum decision of the United States District Court for the Eastern District of Missouri has not been reported. It is reprinted in the Appendix of Griffin's Petition p. B-12a.

### **JURISDICTION**

Invoking federal jurisdiction under 42 U.S.C. §1983, the Cross-Respondent's suit was removed from state court to the Federal District Court, Eastern District of Missouri. On January 3, 1986, after verdict and judgment were entered for the Cross-Respondent, the Eastern District denied Cross-Petitioner's motion for judgment notwithstanding the verdict and for new trial.

On Cross-Petitioner's appeal, the Eighth Circuit on November 6, 1986, entered a judgment and an opinion reversing and remanding the Eastern District's judgment as to Hilke and directing the Cross-Respondent's action as to Stoll be dismissed for failure to present evidence that Stoll was more than negligent under §1983. Petition for Rehearing or Rehearing En Banc was denied on January 22, 1987.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

### **STATEMENT OF THE CASE**

Cross-Respondent, Griffin, incorporates by reference the statement of facts as set forth in Griffin's Petition for Writ of Certiorari, *Griffin v. Hilke*, No. 86-1526. (Pet. pp. 3 - 6.)

## REASONS FOR DENYING CROSS-PETITIONER'S POSITION

**I. A police officer who shoots a fleeing felon should not be entitled to assert a qualified immunity defense under a statute previously declared unconstitutional.**

It is the shooting victim's position that the qualified immunity from suit defense is not available to the police who shoot an unarmed suspect whenever a question exists as to whether reasonable force was used. The mere existence of a statute which may have permitted deadly force shootings under limited circumstances does not mean the police can unilaterally assert that they complied with those circumstances.

In 1974, the Missouri deadly force statute was construed to mean shooting was permissible *as a last resort*. The police maintain they can tell the courts and shooting victims that they complied with the deadly force last resort component of the statute and hence be immune. The position that police can unilaterally, and without challenge, tell the courts that they complied with the requirements of the statute is preposterous and legally unprecedented.

Moreover, the Missouri deadly force statute was held to be unconstitutional in 1976. *Mattis v. Schnarr*, 547 F.2d 1007, 1009 (8th Cir. 1976). More stringent shooting guidelines were established after the *Mattis* ruling. See *St. Louis Board of Police Commissioners Regulations* at p. 5 of Griffin's Petition. These guidelines were state regulations and continued in effect through the time police officer Hilke shot Griffin. The guidelines establish *Tennessee v. Garner*, 105 S.Ct. 1694 (1985), Fourth Amendment limitations on deadly force.

Cross-Respondent/victim's position is simple. First, police are not entitled to qualified immunity from suit merely because a deadly force statute exists. Secondly, the police cannot

unilaterally tell the courts their behavior satisfied a deadly force statute when objectively the police behavior leaves room for reasonable minds to differ as to whether their behavior did or did not satisfy statutory requirements. Third, the more limited state regulations establishing *Tennessee v. Garner* deadly force guidelines prevail over and govern police conduct in the face of a state statute declared unconstitutional, despite a subsequent ruling that vacated *Mattis* on different grounds.

The issue of qualified immunity is discussed at greater length in Griffin's Petition for Writ of Certiorari, *Griffin v. Hilke*, No. 86-1526 at pages 14 - 18.

### CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit, pursuant to Griffin's Petition for Writ of Certiorari, *Griffin v. Hilke*, No. 86-1526.

Respectfully submitted,

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